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August 27, 2008

Mr. Michael Dever
Bureau of Justice Assistance
810 7th Street NW
Washington, DC 20531

Re: OJP Docket 1473

Dear Mr. Dever:

We write to express opposition to proposed changes to 28 C.F.R. part 23.[1] The proposed amendments are intended to encourage local and state law enforcement agencies to collect "intelligence" beyond that related to possible criminal action, and to disseminate more widely that information to other local, state, federal, and tribal law enforcement agencies as well as federal intelligence entities. By so doing, the amendments risk serious infringement on Americans' First Amendment speech, association, and free exercise rights. They will also eliminate important safeguards against false or misleading information being disseminated, retained, and acted upon. The amendments thus contradict Congress's explicit statutory direction that any regulations "assure that such systems are not utilized in violation of the privacy and constitutional rights of individuals."[2]

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[1] Published at 73 Fed. Reg. 44673 (July 31, 2008).

[2] 42 USCA § 3789(g)(c) ("All criminal intelligence systems operating through support under this chapter shall collect, maintain, and disseminate criminal intelligence information in conformance with policy standards which are prescribed by the Office of Justice Programs and which are written to assure that the funding and operation of these systems furthers the purpose of this chapter and to assure that such systems are not utilized in violation of the privacy and constitutional rights of individuals.").

Without question, the amendments' goal of information-sharing between federal and state law enforcement authorities is necessary and important. But the current version of 28 C.F.R. Part 23 already allows ample information-sharing. The long-standing regulation now in force authorizes local and state police to collect information about an individual for an intelligence database when there is a reasonable suspicion that the person is involved in criminal conduct and when the information pertains to that criminal conduct. Police can also disseminate that information when necessary to serve a law enforcement purpose or to prevent imminent harm. No change to the regulation is in fact needed from a law-enforcement or security perspective.

To the extent that increased information-sharing capacities contemplated by the proposed amendments are intended to promote the sharing of terrorism-related information, moreover, no amendment is necessary. Terrorism, as well as many acts preparatory to the commission of terrorism, is already a criminal offense. As such, local and state police already have sufficient authority to collect and disseminate information regarding suspicion of terrorist-related activities.

Finally, the proposed changes to the rule alter the mandate of local and state police in ways that require a detailed federalism analysis pursuant to Executive Order 13,132. The amendments will dramatically expand the kind of information local and state law enforcement will gather. It will also encourage those police agencies to abandon their traditional law enforcement role to take on a new intelligence-gathering mantle. This diverts local police from their traditional focus on public safety: Without additional federal funding, local and state law enforcement in areas with substantial ethnic communities will likely believe that they must take on new intelligence-gathering concerns, leaving less funding to secure those same communities against crime and violence. The change also threatens to create new impediments to police-community cooperation, further impeding public safety goals.[3] In particular, it is likely that this amendment will dramatically change police interactions with certain ethnic communities, who will henceforth know that police regard them as objects of intelligence concern as much as constituencies meriting protection from crime and violence. The amendments' transforming of local and state police into intelligence-gathering agents directly saps the trust that forms the foundation-stone of successful policing. In this regard, the amendments will not only impose new unfunded mandates on state and local governments, but also will interfere with matters of traditional local and state control. In this regard, the regulation has "federalism implications" and thus clearly warrants a "federalism summary impact statement."[4]

We thus urge that the proposed amendments be rejected. We provide more detailed comments below.

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[3] The Supreme Court has recognized these interests as core federalism concerns. *See Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

[4] Executive Order 13,132, 64 Fed. Reg, 43255, 43258 (1999).

* * *

We are concerned in particular about the following changes to 28 C.F.R. Part 23:

- **Section 23.2** of the proposed rule expands the triggers for when intelligence can be gathered. It adds "domestic and international terrorism, *including the material support thereof*," to the list of examples of criminal activities. This change is entirely unnecessary since the list of criminal activities in this section was never intended to be all-inclusive, and because the commission of terrorism is already a criminal offense. We are deeply concerned that expansion to include the ill-understood term "material support," however, will expand local and state law enforcement agencies' perception of what can be collected to include much speech, association, and activity that is constitutionally protected.[5] This is especially so since the *actus reus* for a material support offense is often minimal, innocuous, and may even constitute otherwise protected speech or association.[6] The proposed change is especially worrying because the federal government has recently endorsed recommendations, promulgated by the Los Angeles Police Department about "suspicious activity reporting" ("SARs") that treat taking notes, drawing diagrams, taking pictures or videos, and espousing "extremist views"—all First Amendment-protected activities—as indicative of terrorist activity.[7] In tandem with these SARs, the amendments to the regulation will create powerful incentives to improper local and state intelligence gathering.

- **Section 23.20(a)** adds new language to Section 23.20(a) to "clarify that criminal intelligence information can be collected and maintained about organizations, as well as individuals." But the amendment provides no guidance as to what kind of organizations could be the subject of intelligence gathering. On its face, the amended authority includes non-criminal associations, which exercise First Amendment rights. This is a dangerous expansion of authority that will harm First Amendment free association rights by encouraging local and state police to create "blacklists" of suspect organizations in the absence of any capacity among state and local entities to determine accurately terrorism-related threat levels.

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[5] Even the federal courts have found the boundaries of "material support" difficult to ascertain and fraught with constitutional significance. *See, e.g., Humanitarian Law Project v. U.S. Dep't of Justice*, 352 F.3d 382, 385 (9th Cir. 2003), *vacated en banc* 393 F.3d 902, 903 (9th Cir. 2004). Local and state law enforcement officials are likely to find the concept's boundaries even more resilient to clear and constitutional definition.

[6] Many material support cases—even high-profile ones—involve minimal acts pertaining to terrorism. *See, e.g., United States v. Batiste*, No. 06-20373 (S.D. Fla. June 22, 2006).

[7] *See* FINDINGS AND RECOMMENDATIONS OF THE SUSPICIOUS ACTIVITY REPORT (SAR) SUPPORT AND IMPLEMENTATION PROJECT (June 2008), *available at* http://online.wsj.com/public/resources/documents/mccarecommendation-06132008.pdf.

Furthermore, it will also encourage the nascent trend of targeting politically unpopular organizations by state and local law enforcement.[8]

- **Sections 23.20(e) and (f)** of the proposed change expand the permissible purpose of **law** enforcement intelligence dissemination. They authorize information dissemination to any agency with a counter-terrorism or national security responsibility, or when it may assist in preventing crime or violence or "any conduct dangerous to human life or property." This is an essentially open-ended standard because it will almost always be possible to hypothesize a scenario, however unlikely, in which information leads to the prevention of some dangerous conduct.[9] It is also significantly broader than the current dissemination rule, which is properly limited to law enforcement purposes. This elimination of constraints on dissemination will corrode privacy and civil liberties protections for individuals merely suspected of "dangerous" behavior. We are concerned that this change will remove any effective constraint on state and local agencies' sharing information with intelligence agencies. We also fear this could lead to innocent activity, taken out of context, becoming the basis of adverse actions such as the placement of persons on watch-lists.

- **Section 23.20(f)(2)** as amended will permit the dissemination of an assessment of **criminal** intelligence information "to a government official or any other individual, when necessary to avoid danger to life or property." It removes the word "imminent" from the rule. By so doing, it would vastly increase the amount of criminal **intelligence** information disseminated as it would allow for dissemination where the potential danger was speculative in whole or part. Removing the imminence requirement thus would allow the exception to swallow the rule.

- **Section 23.20(g)** is amended to conform the proposed amendments to Section 23.**20**(e), which we oppose. Without changes to Section 23.20(e), amendments to Section 23.20(g) are unnecessary.

- **Section 23.20(h)** as amended will extend the retention period for information in **criminal** intelligence systems without review or re-validation to ten years, doubling the current maximum retention period of five years. It will allow for the tolling of the **retention** period during a subject's incarceration. Doubling the retention period without review and re-validation will serve no useful purpose. It will instead ensure that more inaccurate, obsolete, and otherwise unreliable information is retained in criminal intelligence systems. This change will necessarily reduce the value of criminal intelligence systems as the volume of obsolete and inaccurate information with those systems increased. Tolling the

[8] *See, e.g.*, Lisa Rein, *Police Spied on Activists in Md.*, WASH. POST, Jul. 18, 2008; Jim Dwyer, *City Police Spied Broadly Before GOP Convention*, N.Y. TIMES, Mar. 25, 2007.

[9] The highly networked domestic intelligence network that exists at a federal level already raises privacy and civil liberties concerns. *See* Robert O'Harrow Jr. & Ellen Nakashima, *National Dragnet is a Click Away*, WASH. POST, March 6, 2008 at A1.

retention period while a subject is incarcerated likewise will serve no legitimate purpose and will only increase the amount of obsolete and inaccurate information in the intelligence systems. Periodic reviews and re-validation of data in criminal intelligence systems is simply good data management practice, regardless of where the subjects of that data happen to be.

* * *

State, local, and tribal police should remain law enforcement officers. They should not be transformed into intelligence agents for the US Intelligence Community. In line with the current regulation, police should only be authorized to collect information about an individual for an intelligence database when there is a reasonable suspicion that the person is involved in criminal conduct and the information pertains to that criminal conduct, and should only be able to disseminate that information when it serves a law enforcement purpose or to prevent imminent harm. Terrorism is criminal activity. Police can collect information they reasonably suspect is related to the criminal activity associated with terrorism without changing the regulations. To encourage intelligence gathering beyond these bounds will invite abuses and the derogation of Americans' privacy rights.

In past moments of national fear and security panic, local and state law enforcement have been conscripted into violations of core First Amendment rights.[10] The proposed rule changes are an invitation to repetition of that ugly episode in American history at a time when tempers and prejudices still run high. We urge you, therefore, not to enact the proposed changes to 28 CFR Part 23, and to take into account the civil liberties, privacy, and federalism concerns raised by this issue more seriously in any subsequent regulatory efforts.

Sincerely,

Aziz Huq
Director, Liberty and National Security Project

[10] *See* FRANK DONNER, PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA (1991).